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No. 97, Original.

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[redacted] Court of the United States.

[redacted] Term, 1909.

[redacted] Matter of the Application of D. H. Bowles for a Writ of Mandamus to Hon. W. I. Grubb, District Judge, Designated to Hold the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.

PETITION FOR WRIT OF MANDAMUS TO JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

[redacted] FOR THE RESPONDENT.

[redacted]

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION OF D. H. Riddle for a writ of mandamus to Hon. W. I. Grubb, United States District Judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama. } No. 27, Original.

PETITION FOR WRIT OF MANDAMUS TO JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR THE RESPONDENT.

This case is here on a rule previously made to show cause why the writ of mandamus should not issue against the Hon. W. I. Grubb, United States District Judge for the Northern District of Alabama, to require him to cause the minute entry or judgment entry in a criminal case to be amended so as to show that the jury which tried the case consisted of only eleven jurors.

THE CASE.

The case, as made by the petition filed in this court and the copy of the record in the court below, attached thereto, is this:

The petitioner and others were indicted for a violation of section 215 of the Penal Code, and in August, 1920, were convicted and given penitentiary sentences in addition to fines.

When the case came on to be tried there was difficulty in securing a jury. Only 11 jurors had been secured when the list of those summoned for jury service was exhausted. The presiding judge, however, ordered other jurors to be summoned. This was done, and six of those so summoned were found to be duly qualified. At this stage of the proceedings, however, pursuant to an agreement between the United States district attorney and the attorneys representing the defendants, the additional 6 jurors were not called, but the case proceeded and was tried by a jury consisting of the 11 selected from the original list. (Rec., pp. 2–3.) While the petition filed in this court simply states that this agreement was made by the attorneys in the case, it was expressly stated by the petitioner, in the petition which he filed in the court below, and which is a part of the record exhibited with his petition in this court, that he was personally a party to the agreement. (Rec., pp. 49–50.)

In pursuance of this agreement, the names of the jurors were not set out in the minute entry, which was as follows:

> To try this cause come a jury of good and lawful men duly empaneled, sworn and charged a true verdict to render according to the law and the evidence. (Rec., pp. 4, 44.)

The verdict was returned and sentence imposed August 20, 1920. On September 18 the petitioner filed with the clerk of the court a petition addressed to the presiding judge praying that the minute entry above quoted be amended so as to show that the jury was composed of only 11 men, together with any agreement or understanding which may be regarded as necessary to explain why said cause was tried by said jury of 11 men instead of 12 men. (Rec., pp. 49–50.) There was a hearing on this petition on October 26, 1920, and the court made the following order:

> The motion to amend the record of the judgment entry in this cause coming on to be heard this day, and the plaintiff appearing by the Honorable Erle Pettus, United States district attorney, and the defendants all being present in person, and the movant, D. H. Riddle, being present in person and by attorney, evidence was offered by the movant in support of the motion, and the court after hearing the evidence and argument of counsel for the movant, being of the opinion that the record of the judgment entry is as it should be, and does not need amendment, and that the motion is not well taken:
>
> It is ordered and adjudged by the court that said motion be and is hereby denied;

and the movant excepts to the ruling of the court in this behalf. (Rec., pp. 51–52.)

The petition filed in this court complains that evidence offered in support of this motion was, on objection made by the district attorney, excluded, and that the court erroneously refused to amend the record entry.

QUESTION INVOLVED.

The question involved is whether the judgment of the district court declining to amend the minute entry can be reviewed and the error, if any, corrected by the writ of mandamus, and the district judge ordered to cause the minute entry to be put in such form as this court may adjudge proper.

BRIEF.

I.

The complaint is not that the judge has refused to act, but that he has acted erroneously.

It will be seen from the foregoing statement that, with respect to the matter in dispute, the district judge has not refused to act. The complaint, on the contrary, is that he has acted, but that his action was erroneous. The matter was formally presented to him, as the presiding judge, by a petition. He took jurisdiction and entertained the petition, on which there was a formal hearing. He then entered a judgment, declining to grant the prayer of the petition. The only complaint is that he erroneously excluded evidence offered and reached an erroneous

conclusion. If he had declined to entertain the petition or to render any judgment upon it, the writ of mandamus might have been the proper remedy to require him to act. If that had been the case, however, this court would not have directed him to grant the relief sought, but merely to entertain the petition and decide the issue according to his own judgment, leaving the petitioner to pursue the proper remedy in the event that judgment was erroneous.

II.

The substance of the judgment below is that, in view of the circumstances, the record entry correctly states the facts.

The record, as presented by the petitioner, makes plain the action of the court and the reason therefor. The contention presented was that the minute entry should affirmatively show that the jury consisted of only 11 men. It is complained that, in the hearing of the petition, the judge, sustaining the objection of the United States district attorney, declined to admit evidence of this fact. The case, according to the petition filed in this court, had proceeded to trial before a jury composed of 11 men by virtue of an agreement to that effect entered into by the petitioner himself. And it is a fair inference that the agreement was to the further effect that the jury so composed should be treated by the court as a lawful jury. This would imply that the record should simply show a trial by a lawful jury. The minute

entry made no misstatement of fact. It merely recited "a jury" of good and lawful men. The question presented to the district judge was whether a jury agreed to in the manner shown was a jury regardless of whether it was composed of 12 or 11 men. His view obviously was that such a jury was a lawful jury, and therefore it was utterly immaterial whether it was composed of 12 or 11 men. Entertaining this view, he very properly declined to hear evidence on that question. The question now is not whether this view was erroneous, but whether, if so, mandamus is available as a remedy. He had jurisdiction of the case and of the petition which sought to have the record amended. The petition called for the exercise of judgment. He did not refuse to exercise this judgment, but acted judicially upon the petition and rendered his judgment.

III.

If the judgment rendered on the petition by the court below was erroneous, the petitioner had a plain and simple remedy by writ of error.

As we have seen, the petitioner's complaint is that he was not accorded his right to be tried by a jury of 12 men and that the minute entry failed to show this fact. The entry, as it stands, in no way embarrassed his right to have his alleged constitutional right passed on by an appellate court. The minute entry showed merely that he had been tried by a jury of good and lawful men. He had called in question the correctness of this entry by asserting in his peti-

tion the fact that the jury consisted of only 11 men. On this he had invoked the judgment of the court, which was adverse to him, being, in substance, that the jury was a lawful jury under the circumstances, whether composed of 12 or only 11 men. For this reason, evidence offered by him as to the number of men composing the jury had been excluded, and he had excepted to this action. If he desired a review of the case, in order to assert his alleged constitutional right, all he had to do was to sue out a writ of error and tender to the district judge a bill of exceptions, stating truly everything material that had occurred from the beginning to the end of the trial. If his petition in this case gives a true history of what occurred, his bill of exceptions would have contained the express agreement made in open court under which the case was to be tried by a jury of 11 men, and also the fact that it was so tried. The same bill of exceptions would have shown that, on his petition to amend the record, he offered to prove the fact and was not permitted to do so. On a trial in the appellate court, with this bill of exceptions, that court would have been called upon to determine whether, in view of his agreement, he had been denied any constitutional right, or, if it was necessary to amend the record, whether the judge was in error in overruling his petition to that effect. In other words, every question which he now seeks to make in this court could have been made in a trial on writ of error, with a proper bill of exceptions. Of course, if he had

tendered a bill of exceptions, setting out the agreement made in open court, and his offer of evidence in support of his petition to amend the record, and the judge, though admitting the facts to be correctly stated, had declined to sign the bill of exceptions, he would have been entitled to the writ of mandamus to require it to be signed. This was not done, however, and no contention is presented here which could not have been just as readily presented in the ordinary way by prosecuting a writ of error.

IV.

The petitioner is not entitled to a writ of mandamus to serve the same purpose which would be served by a writ of error.

This court has always held that mandamus can not be used to perform the function of a writ of error or an appeal or to direct *how* a judge shall decide a matter within his jurisdiction.

In *United States* v. *Judge Laurence* (1795), 3 Dall. 42, 53, the French consul had applied to the district judge for a warrant for the arrest of a deserter under the consular convention with France. The judge refused the warrant on the ground that the consul did not furnish the particular formal evidence required by the convention to the point of service in the French army. Thereupon the United States applied for a mandamus, in refusing which the court said:

> We are clearly and unanimously of opinion that a *mandamus* ought not to issue. It is evident that the district judge was acting in

> a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dictates of any judgment but his own.

In *Ex parte Whitney* (1839), 13 Pet. 404, 408, the trial judge insisted that the procedure on a bill in equity should be according to the rules established in his court and not according to the rules established by this court. An application for a mandamus to compel him to proceed according to the latter was denied, the court saying:

> But the question before us is not as to the regularity and propriety of those proceedings, but whether the case before us is one in which a mandamus ought to issue. And we are of opinion that it is not such a case. The district judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained by an appeal after the final decree shall be had in the cause. A writ of mandamus is not the appropriate remedy for any orders which may be made in a cause by a judge in the exercise of his authority; although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form.

In *Ex parte Taylor* (1852), 14 How. 3, 12, 13, a mandamus to compel the trial judge to accept bail in the amount fixed by statute was denied.

In *Ex parte Many* (1852), 14 How. 24, 25, a judgment had been entered in favor of plaintiff for a certain amount with costs, but the amount of the costs was left blank. On affirmance by this court and return to the trial court, the plaintiff moved to amend the record so as to insert the amount of the taxed costs, and on denial of this motion sought a mandamus from this court, which said:

> The decision of the circuit court was not a mere ministerial act. It was the decision of a court of competent jurisdiction, made in the exercise of judicial authority and discretion. This court might unquestionably issue a *mandamus* to the court below to proceed to judgment. But in this case the court has proceeded to judgment upon the question submitted for its decision. And whether that judgment be erroneous or not, this court has not jurisdiction to reexamine it in a proceeding by *mandamus*.

In *Ex parte Newman* (1871), 14 Wall. 152, 165, 166, where the lower court refused to take jurisdiction and there was no right to writ of error or appeal this court said:

> Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or

> where such a court, having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.

In *Ex parte Burtis* (1880), 103 U. S. 238, a motion was made to the trial court to compel the production and use of certain testimony which was denied. In refusing a mandamus this court said:

> The district judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism; but we can not, by *mandamus*, compel him to undo what he has thus done in the exercise of his legitimate jurisdiction.

In *Ex parte Morgan* (1884), 114 U. S. 174, 175, 176, a motion was made, and denied, to amend a judgment so as to conform to the complaint and the verdict. On application for a mandamus this court said:

> "Here a judgment has been rendered and entered of record by the circuit court in a suit within its jurisdiction. The judgment is the act of the court. It is recorded ordinarily by the clerk as the ministerial officer of the court, but his recording is in legal effect the act of the court, and subject to its judicial control. The clerk records the judgments of the court, but does not thereby render the judgments. If there is error in the judgment as rendered it can not be corrected by mandamus, but resort must be had to a writ of error or an appeal. *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183.
>
> If a clerk in performing the ministerial act of recording a judgment has committed an error, the court may on motion at the proper time correct it, or it may do so in a proper case upon its own suggestion without waiting for the parties. Here the plaintiffs, believing that the judgment as recorded did not conform to the finding, moved the court to amend it in that particular. This motion the court entertained, but, being of the opinion that the judgment had been correctly recorded, refused the amendment which was asked. In this the court acted judicially, and its judgment on the motion can no more be reviewed by mandamus than that which was originally entered in the cause.

In *Ex parte Brown* (1886), 116 U. S. 401, 402, a mandamus was asked to compel a territorial court to take jurisdiction of a case and hear it on the merits. This court said:

> According to the petition, the court entertained jurisdiction of the cause, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action. This is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary. *Ex parte Morgan*, 114 U. S. 174, and cases cited.

That the law is as laid down in these cases, notwithstanding any confusion that was thought to have arisen from some other cases, was made plain by the very exhaustive opinion in *Ex parte Harding*, 219 U. S. 363. In that case all these cases were carefully reviewed, and it was pointed out that there were two lines of cases between which there was an apparent conflict, and the holding in one line of cases, which are the cases relied on by petitioner here, explained and to some extent qualified. The general rule was then laid down that the writ of mandamus will not lie to review the action of a district court in a matter over which it has jurisdiction when the action is one which is subject to review on appeal or writ of error. The rule as quoted from *In re James Pollitz*, 206 U. S. 323, 331, is that—

> mandamus can not be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

In the present case there is no question but that the court had jurisdiction of the entire case. It is equally clear that that court had jurisdiction of the petition to amend the record and that it acted judicially thereon. The only thing that the district judge could now be directed to do by the writ of mandamus would be to reverse the judgment he has already rendered. As we have seen, that judgment was subject to review upon writ of error. Obviously, then, the writ of mandamus, if granted in this case, would compel the court below to decide a matter before it in a particular way, and would be used to perform the office of an appeal or writ of error. If it be conceded, which it is not, that the action of the court below was erroneous, it is perfectly clear, under the rule well established in this court, that the petitioner is not entitled to the writ of error.

There is nothing in the cases later than *Ex parte Harding, supra,* which in any way modifies the rule laid down in that case.

In *Ex parte First National Bank* (1913), 228 U. S. 516, 518, a mandamus was asked to compel the lower court to reinstate a bill of exceptions which it had stricken out of the record as not conforming to its rule. In denying the petition this court said:

> We deem it unnecessary to detail the contentions as to the compliance or noncompliance by counsel in the bills of exceptions referred to with the rule of court on the subject, nor do we think it necessary to consider whether the rule warranted the particular exertion of power, and if it did authorize such exertion of power, whether it was amenable to condemnation. In view of the fact that the case was heard below on the merits, and it was not until after such hearing that the court sustained the motion to strike out the bill of exceptions, we are of opinion that the case presented is not one "where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise." (*In re Parker*, 131 U. S. 221.) The court below, in effect, took jurisdiction, and its action in striking out the bill of exceptions was at best but an error committed in the exercise of its judicial discretion, to correct which is the province of a writ of error where the right to such writ obtains. *Ex parte Brown*, 116 U. S. 401; *Ex parte Harding*, 219 U. S. 363.

In *Ex parte American Steel Barrel Company* (1913), 230 U. S. 35, 45, 46, a similar ruling was made as to the refusal of the senior circuit judge to designate a trial judge in place of one claimed to be disqualified. See also *Ex parte Wagner* (1919), 249 U. S. 465, 471.

The rule laid down in *ex parte Harding* was affirmed in *Ex parte Roe*, 234 U. S. 70, 73, and in *Ex parte Park Square Automobile Station*, 244 U. S. 412, it was cleared of certain misconceptions by the statement

that the remarks in *Ex parte Harding* as to the use of the writ of mandamus in cases of the unwarranted exercise of jurisdiction were meant to apply only to those cases where there was no other remedy. The court continued (244 U. S. 415):

> But this did not in the slightest degree qualify or limit the comprehensive rule which was established as to the second class to the effect that, where statutory methods of review of questions of jurisdiction were provided for, they could not be disregarded, and therefore that there was no power to override the statutory provisions by resorting to the writ of mandamus.

In *Ex parte Simons*, 247 U. S. 231, the writ of mandamus or prohibition or certiorari was sought upon the ground that the district judge had transferred a law cause to the equity side of the court and had thus deprived the petitioner of the right to a trial by jury. This order, of course, would not be subject to review on appeal or writ of error until a final judgment or decree in the case. The petition was filed immediately. This court held that the district court was without jurisdiction to try the case on the equity side and that the petitioner was entitled to a trial at law. The jurisdiction of this court was put upon the ground that the district court had refused to take jurisdiction on the law side of the court, Mr. Justice Holmes saying:

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt

> with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to produce [proceed] and to give the plaintiff her right to a trial at common law. (Id., pp. 239–240.)

In other words, the court was simply required by mandamus to assume a rightful jurisdiction which it had erroneously repudiated, and the petitioner was not required, before asserting this right, to go through a useless trial in order that a final decree might be rendered and reviewed.

In the present case the district judge did not repudiate jurisdiction. but assumed it, and acted judicially upon the matter presented to him. Moreover, the writ of mandamus could in no way hasten a final determination of the question. The court below had finally acted. It would have been no more burdensome, either to petitioner or the courts, to have sued out a writ of error instead of filing a petition for mandamus in this court.

In Ex parte Abdu, 247 U. S. 27, there was a petition for mandamus to require the clerk of one of the circuit courts of appeals to file a record without a deposit to secure costs. Although declining to grant the writ, upon the ground that the action of the clerk

was proper, the court held that it had jurisdiction and would have granted the writ if the contention made by the petitioner had been correct under the statute. The jurisdiction was placed upon the ground that it was a case in which this court had the ultimate discretionary power to review the cause on certiorari, and that the refusal to file the record would have a deterrent influence upon the practical exertion of that power. In that case, however, the refusal of the clerk to file the record prevented the litigant from bringing his case before the court and obtaining a judgment which might thereafter be be reviewed. The jurisdiction by mandamus rested upon the same principle as in a case in which the court erroneously declines to take jurisdiction.

In Ex parte Peterson, 253 U. S. 300, the jurisdiction was placed upon the same ground. There, in a law case, the trial judge had appointed an auditor for certain purposes. The contention was that this deprived the petitioner of a right to a trial by jury. Upon a careful examination the court held that the order appointing the auditor was, in effect, in aid of an intelligent trial by jury, and hence was a proper order to make, and the writ was denied. The jurisdiction to grant it, however, if the court had taken a different view of the propriety of the order, was sustained, Mr. Justice Brandeis saying (pp. 305–306):

> It is insisted that the district court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his re-

port should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U. S. 231, 239, "be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by" a proceeding "that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded.

These cases do not in any way depart from the rule laid down in *Ex parte Harding, supra*, or, if at all, they only make an exception to that rule in cases where a court makes an order beyond its jurisdiction, the result of which will be to render unnecessary a long and tedious trial in order to have a final judgment reviewed and set aside.

Nothing of that kind is present in this case. No proceedings in the court below were in any event to follow the order which it is claimed was erroneous. That was the final action of the district court. It is plainly an action which the law makes reviewable upon writ of error and there can not be the slightest reason for resorting to the extraordinary writ of mandamus. The case is clearly within the rule laid down in *Ex parte Harding* and the writ should be denied.

It does not appear whether the petitioner has, in fact, sued out a writ of error or intends to do so. But, however this may be, he is now complaining of a matter to which he not only did not except at the time but to which he agreed. In filing this petition he has ignored the plain remedy which the law gave him. If he does not choose to avail himself of this remedy he can not justly complain if this court refuses to depart from the rule which it laid down, with so much care and with the declared purpose of obviating confusion, in *Ex parte Harding*.

CONCLUSION.

We have not discussed the question as to whether there was any error in the action of the court, or whether the petitioner was deprived of any constitutional right. That question is wholly beside the issue now presented. It is involved in the judgment of the district court, which is subject to review on writ of error.

For the reasons above stated it is respectfully submitted that, upon the petition and answer in this case, the court is clearly without jurisdiction to grant the writ of mandamus and it should be denied.

WILLIAM L. FRIERSON,
Solicitor General.
ERLE PETTUS,
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W. C. HERRON,
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FEBRUARY, 1921.

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